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No. 86-1390

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC.,
Petitioner,

v.

UNITED STATES NUCLEAR REGULATORY COMMISSION
and the UNITED STATES OF AMERICA,

and

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF RESPONDENTS THE CLEVELAND ELECTRIC ILLUMINATING COMPANY, *ET AL.*, IN OPPOSITION TO CERTIORARI

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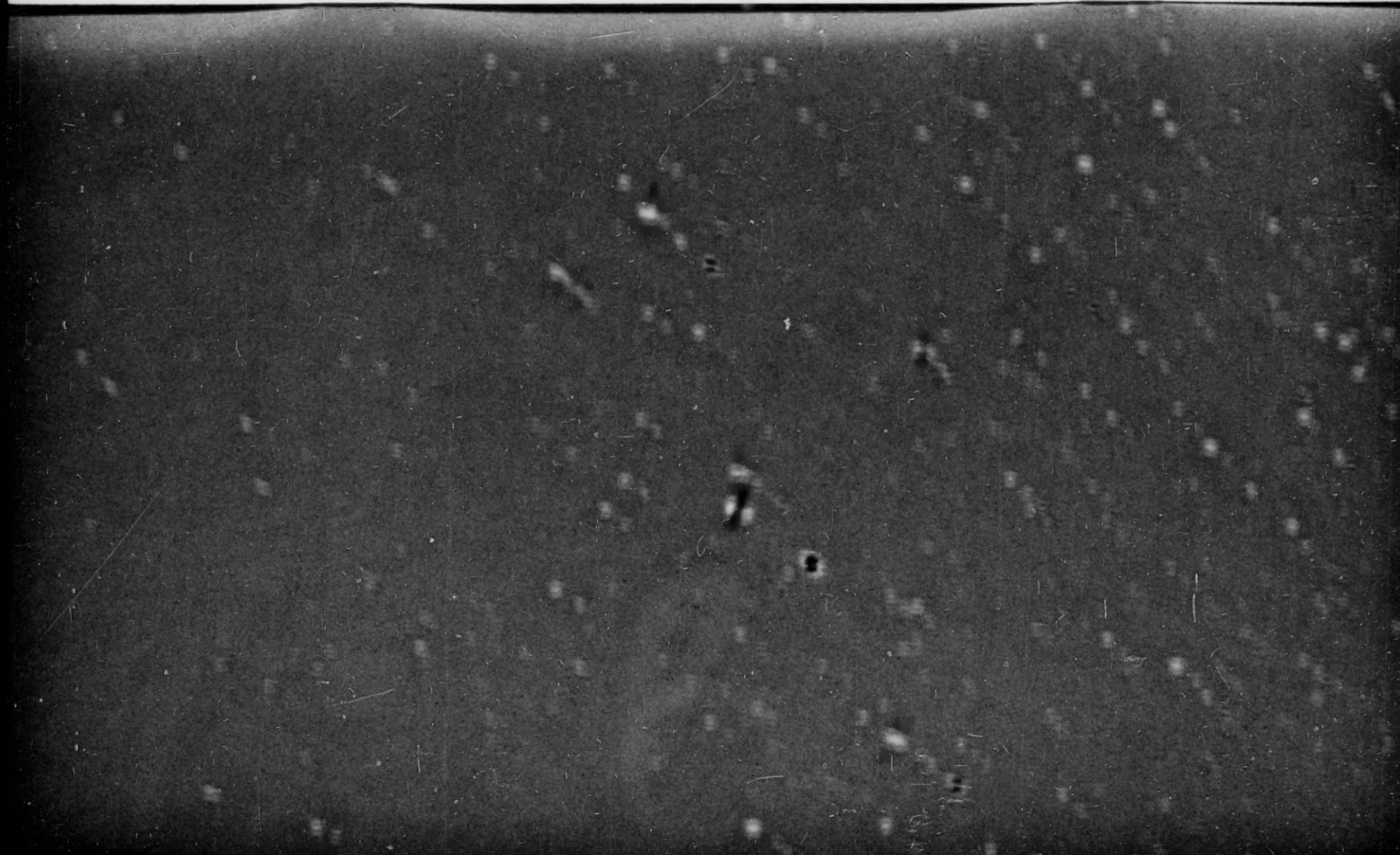

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit correctly decided that the Nuclear Regulatory Commission's denial of a motion to reopen the record was not a "final order" appealable to a federal court of appeals.

2. Whether a court of appeals decision that the Nuclear Regulatory Commission's denial of a motion to reopen the record was not a "final order" is rendered moot by that court's subsequent decision that denial of the motion to reopen was proper.*

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* Pursuant to Supreme Court Rule 28.1, Respondents state that The Cleveland Electric Illuminating Company and The Toledo Edison Company are wholly-owned subsidiaries of Centerior Energy Corporation and that Pennsylvania Power Company is a wholly-owned subsidiary of Ohio Edison Company.

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Respondents The Cleveland Electric Illuminating Company, Duquesne Light Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company ("the Utilities") submit this brief in opposition to the petition for a writ of certiorari filed by petitioner Ohio Citizens for Responsible Energy, Inc. ("OCRE").

STATEMENT OF THE CASE

This case involves the attempt by a party to a licensing proceeding before the Nuclear Regulatory Commission ("NRC") to judicially challenge an interlocutory order not to reopen an already completed administrative hearing record. In this case, the NRC declined to reopen the record in view of petitioner's unsubstantiated claims about the adequacy of the design of a nuclear power plant to withstand an earthquake. The United States Court of Appeals for the Sixth Circuit held that Congress' requirement that there be a "final order" before judicial review is available prohibited petitioner from prematurely seeking judicial review of this interlocutory order.

The Utilities are five electric utilities licensed by the NRC under the Atomic Energy Act of 1954, as amended, 42 U.S.C. §§ 2011-2284 (1982) ("the Act"), to own and operate the Perry Nuclear Power Plant ("Perry").[1] Perry is a two-unit commercial nuclear power plant located on the shore of Lake Erie approximately 35 miles northeast of Cleveland. Perry Unit 1 is currently licensed to operate at full power.

In June 1973, the Utilities applied to the Atomic Energy Commission (the predecessor agency to the NRC) for authorization to build Perry. Following detailed technical reviews by the Commission Staff, including evaluation of the facility's seismic design, and lengthy public hearings, the NRC issued construction permits in May 1977. In June 1980, while construction was underway, the Utilities applied for operating licenses from the NRC. OCRE and several other organizations and individuals intervened in the NRC proceeding on the operating license application.

[1] The Utilities intervened in the court of appeals proceeding pursuant to 28 U.S.C. § 2348 (1982).

After extensive evidentiary hearings, the NRC's Atomic Safety and Licensing Board ("Licensing Board") resolved all contested matters in favor of the Utilities and authorized full-power operation of Perry. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), LBP-83-77, 18 N.R.C. 1365 (1983); LBP-85-35, 22 N.R.C. 514 (1985). OCRE's appeals to the NRC's Atomic Safety and Licensing Appeal Board ("Appeal Board") also were resolved in favor of the Utilities. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-802, 21 N.R.C. 490 (1985); ALAB-841, 24 N.R.C. 64 (1986), *reconsideration denied*, ALAB-844, 24 N.R.C. 216 (1986). None of the contested issues challenged the seismic design of the Perry facility.[2]

On January 31, 1986, after final Licensing Board action and while OCRE's appeal was pending before the Appeal Board, an earthquake occurred in northeastern Ohio. The earthquake measured 5.0 in magnitude and its epicenter was located approximately ten miles south of the Perry facility. On February 3, 1986, OCRE filed with the Appeal Board a Motion to Reopen which sought to raise a contention challenging the seismic design of the Perry facility. This contention was based upon a newspaper article which cited acceleration forces allegedly in excess of the Perry design.

With the assistance of numerous experts, both the Utilities and the NRC Staff developed detailed studies of the significance of the earthquake. Relying on these technical analyses, the Utilities and the NRC Staff opposed the Motion to Reopen on the ground that the 1986 earthquake did not present a significant safety ques-

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[2] In addition to the trial-type procedures, and as part of its independent regulatory responsibilities at the operating license stage, the NRC Staff carried out and published extensive reviews of the entire plant design. These reviews included an analysis of the plant's seismic design.

tion.[3] This result is not surprising since the design of the Perry facility is based upon an earthquake of magnitude 5.3, about *twice* as energetic as the January 31, 1986 earthquake.

In the face of these detailed reviews of the design of Perry, OCRE abandoned its initial contention and conceded that the earthquake caused little or no damage to the plant and that the exceedences of the design acceleration "do not have engineering significance." In place of its abandoned argument, OCRE's reply to the Appeal Board alleged, without any evidentiary support whatsoever, that the earthquake established the existence of a "capable fault" as that term is defined in NRC regulations, 10 C.F.R. Part 100, App. A (1986). Both the Utilities' and the NRC Staff's answers to the original motion had, by sworn expert affidavits, shown that the earthquake did not demonstrate the presence of a "capable fault."

In an unpublished Memorandum and Order issued on March 20, 1986, the Appeal Board was unable to conclude that OCRE had met the NRC's three-part test for reopening a closed evidentiary record. However, despite OCRE's concession that the accelerations "do not have any engineering significance" and despite the absence of evidentiary support for OCRE's capable fault assertion, the Appeal Board also said that it was unable "to make an informed judgment on the basis of [the] preliminary written materials." Memorandum and Order at 6. The Appeal Board therefore ordered a hearing to obtain further information "to aid our determination on whether there is warrant to reopen the record." *Id.* at 7. It reached this decision even though OCRE had "not given

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[3] The NRC's independent Advisory Committee on Reactor Safeguards also concluded, based upon hearings held to review the effects of the earthquake, that the earthquake was unlikely to lead to any requirements that would significantly change the design of the Perry plant's structure or its equipment.

us any cause to believe that, were we to admit its new contention for litigation, it would be able to make a substantial contribution to its resolution." *Id.* at 6.

On April 18, 1986, the NRC, acting *sua sponte* under its inherent supervisory authority, vacated the Appeal Board's order setting up the exploratory hearing and denied OCRE's Motion to Reopen. *Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-07, 23 N.R.C. 233 (1986); Petitioner's Appendix ("Pet. App.") at B1-B17. Citing NRC precedent that "[a] Board is to decide the motion to reopen based on the information before it and has no authority to engage in discovery in order to supplement the pleadings before it," the NRC determined that the Appeal Board's actions "warranted intervention in order to clarify a misinterpretation of Commission case law and precedent." 23 N.R.C. at 234. (Pet. App. at B1-B2). The NRC reiterated that "the burden of satisfying [the] reopening requirements is on the movant" and that the Appeal Board must base its decision "on what is before them." *Id.* at 235. (Pet. App. at B5).

Finding that OCRE had not demonstrated the existence of a significant safety issue, the NRC denied OCRE's Motion to Reopen. *Id.* at 236. (Pet. App. at B8). Noting that "[m]atters which need to be addressed before licensing can be handled by the Commission and its Staff outside of the adjudicatory context," the NRC Commissioners directed their staff to be prepared to discuss the significance of the earthquake at the meeting to be held by the NRC on the Perry full-power operating license. *Id.* (Pet. App. at B7-B8). OCRE and the Utilities were also invited to make and did make presentations at that meeting which was held on September 5, 1986.

On April 23, 1986, OCRE filed in the Court of Appeals for the Sixth Circuit a petition alleging that the NRC's April 18, 1986 order violated the Atomic Energy Act by

denying OCRE an adjudicatory hearing. On August 13, 1986, the NRC published notice that a discussion and possible vote on the issuance of a full-power operating license for Perry would be held on September 5, 1986. 51 Fed. Reg. 29,043. On September 4, 1986, the NRC denied a request from OCRE that the scheduled September 5 meeting be rescheduled. That same day the Court of Appeals stayed the NRC's vote. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, No. 86-3355 (6th Cir. Sept. 4, 1986). (Pet. App. at A1-A3).

After setting an expedited briefing schedule and after hearing oral argument on whether it had jurisdiction over OCRE's petition challenging the Commission's April 18 order, the Court of Appeals issued an Order on October 14, 1986, dissolving the stay and dismissing OCRE's petition for review for lack of jurisdiction. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 803 F.2d 258 (6th Cir. 1986). (Pet. App. at A4-A10). The Court of Appeals, "guided by well-reasoned precedent from other jurisdictions," found that "the order denying [OCRE's] motion to reopen . . . was not a final order." *Id.* at 259, 260. (Pet. App. at A5, A7). Recognizing that procedural or evidentiary rulings in the course of a licensing proceeding may be challenged in the review of the "final licensing decision," the court concluded "that, in licensing proceedings before the NRC, a final order is the order granting or denying a license." *Id.* at 260-61 (citations omitted). (Pet. App. at A8).

The Court of Appeals did recognize that "interlocutory review may be appropriate under certain circumstances." *Id.* at 260. (Pet. App. at A7). However, because of the absence of documentation from OCRE and the "extensive evidence in opposition," a majority of the panel was persuaded that the NRC's decision was not so "flagrantly wrong" as to justify an exception to the final order requirement. *Id.* at 260. (Pet. App. at A8). The dissenting Judge would have found that the NRC's order

was appealable under the so-called collateral order doctrine. *Id.* at 261. (Pet. App. at A10). On October 23, 1986, OCRE filed a Petition for Rehearing *en banc* which was denied on November 25, 1986. (Pet. App. at A11-A12).

In the meantime, the NRC had issued the full-power operating license for Perry on November 13, 1986. Use of this license was immediately stayed by the Court of Appeals. *State of Ohio ex rel. Celebrezze v. NRC*, No. 86-4019 (6th Cir. Nov. 13, 1986). In addition, both the State of Ohio (raising unrelated issues) and OCRE filed petitions seeking review of the NRC's decision to authorize issuance of the full-power operating license.[4] The three review petitions were consolidated. After full briefing on the merits by all parties, and after hearing oral argument, the Court of Appeals lifted the November 13 stay by an order issued December 23, 1986. On March 17, 1987, the Court of Appeals issued its opinion upholding on the merits the NRC's denial of OCRE's motion to reopen (as well as rejecting the State's petitions). In a well-reasoned decision not now before the Court, the Sixth Circuit found OCRE's position to be "without merit" and denied the petition for review. *See State of Ohio v. NRC*, Nos. 86-4019, -4037, -4038 (6th Cir. Mar. 17, 1987); Utilities' Appendix ("Util. App.") at 1a-14a.

On December 31, 1986, Justice Scalia, as Circuit Justice for the Sixth Circuit, held that he did not have jurisdiction over OCRE's request for review of the Court of Appeals' decision to lift the November 13 stay on the grounds that this order was an unreviewable interlocutory order. Nor could OCRE demonstrate, in Justice Scalia's opinion, sufficient justification to issue an original writ of injunction under the All-Writs Act, 28

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[4] *Ohio Citizens for Responsible Energy, Inc. v. NRC*, No. 86-4037 (6th Cir. filed Nov. 14, 1986) and *State of Ohio ex rel. Celebrezze v. NRC*, No. 86-4019 (6th Cir. filed Nov. 7, 1986) and No. 86-4038 (6th Cir. filed Nov. 14, 1986).

U.S.C. § 1641(a) and Supreme Court Rule 44.1. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 107 S. Ct. 682 (Scalia, Circuit Justice 1986). On January 8, 1987, Justice Scalia also denied OCRE's application to stay the full-power operation of Perry pending certiorari proceedings in this Court. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, A-499.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision that the NRC's denial of a motion to reopen is not a final order is in accord with decisions of this Court and of the courts of appeals. In order to overcome the strong policy interest against interfering with the administrative process, this Court consistently has required that appealable decisions involve significant, concrete injury to a legal right. OCRE cannot meet this requirement. The NRC's order did not terminate its participation in an on-going licensing proceeding and did not grant any right to operate the Perry plant.

Second, judicial review of the NRC's non-final order is not available under the collateral order doctrine. An NRC decision not to reopen the record is but a step towards the final disposition of the merits of a case and does not infringe upon any right which is collateral to the proceeding. In addition, as a party to the licensing proceeding, OCRE was sufficiently protected by its right to appeal the grant of the full-power operating license. Furthermore, because the NRC's decision not to reopen the record was entirely correct, as the Sixth Circuit has now held, there is no need to protect OCRE from being subjected to a clear and manifest injustice.

Third, review of the Court of Appeals' October 14, 1986 decision is unavailable because the issue is moot. Judicial review on the merits of petitioner's claims already has been provided by the Court of Appeals and

those claims have been rejected. It is thus of no value to any party to determine whether those same claims should have been heard one month sooner or were correctly dismissed for lack of a final order.

I. THE COURT OF APPEALS CORRECTLY FOLLOWED FEDERAL PRECEDENT IN HOLDING THAT DENIAL OF A MOTION TO REOPEN THE RECORD IS NOT A "FINAL ORDER"

Under Section 189(b) of the Atomic Energy Act, 42 U.S.C. § 2239(b) (1982), "final orders" involving the granting, suspending, or amending of Atomic Energy Act licenses are "subject to judicial review in the manner prescribed in the Act of December 29, 1950." That Act, commonly referred to as the Administrative Orders Review Act or the "Hobbs Act," is codified at 28 U.S.C. §§ 2341-2351 (1982) and provides for review by the courts of appeals of "all *final orders* of the Atomic Energy Commission made reviewable by [Section 189 of the Atomic Energy Act]." 28 U.S.C. § 2342(4) (1982) (emphasis added). This provision now applies to the Nuclear Regulatory Commission.[5] In short, the Atomic Energy Act and the Hobbs Act authorize a court of appeals to review only "final orders" from the NRC.

As a general rule, a final order is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)). In *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970), the Court applied this principle to administrative proceedings and set forth the "relevant considerations in determining

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[5] *See* 42 U.S.C. § 5871(g) (1982); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 733 (1985).

finality" for purposes of the Hobbs Act.[6] These factors are: (a) whether judicial review will disrupt the orderly process of adjudication; and (b) whether rights or obligations have been determined, or legal consequences will flow from the agency action. *Id.* at 71. These factors have been consistently applied by this Court to review administrative orders. *See, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 239-43 (1980); *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948) ("[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.").[7]

OCRE argues (Pet. at 20-21) that denial of its motion to reopen was a final order because it was the last decision on whether there would be an adjudicatory hearing. This argument proves too much. Recognizing that every order is a definitive statement on the subject of the order, the Court in *FTC v. Standard Oil Co.* rejected the argument that to secure judicial review it is sufficient to allege that the administrative agency has made "a definitive statement of [its] position." 449 U.S. at 241. Rather, to be a final order OCRE must show that the NRC decision "inflicts an actual, concrete injury." *E.g., Williamson County Regional Planning Comm. v. Hamilton Bank*, 105 S. Ct. 3108, 3120 (1985).

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[6] Thus, OCRE is simply wrong when it claims that "[t]his Court has not defined 'final order' under the 'Hobbs Act' . . . ." (Pet. at 13-14).

[7] OCRE's attempt (Pet. at 20) to create uncertainty by reference to this Court's recent analysis of the Hobbs Act in *Florida Power & Light Co. v. Lorion*, 470 U.S. 729 (1985), is without basis. *Florida Power* did not depart from the well-settled method of determining finality. Justice Brennan's opinion only decided that "42 U.S.C. § 2239 vests in the courts of appeals initial subject-matter jurisdiction over [Nuclear Regulatory] Commission orders denying [10 C.F.R.] § 2.206 citizen petitions." 470 U.S. at 746. There was no dispute that such orders were final and no indication that the court applied factors other than those set out in *Port of Boston*.

OCRE's evidence of an "actual, concrete injury" is the unsupported claim that the NRC's order "deprives the petitioner of its right to participate in an adjudicatory hearing" and that "harm and consequences attach to OCRE as a result." (Pet. at 21). This allegation lacks all credence. OCRE was an intervenor in the NRC proceeding and was allowed to participate for over five years in the formal, on-the-record operating license adjudication. Furthermore, OCRE's participation included the opportunity to file the motion to reopen which is the subject of this case. Surely the right to participate does not require that the NRC adopt all of OCRE's positions, and there is no reasonable basis for concluding that denial of a motion to reopen constitutes a denial of participatory rights.

It also is difficult to see how OCRE suffered "actual, concrete injury" since the NRC's April 18, 1986 order was not an opinion on the merits of the full-power license, but merely an interlocutory procedural ruling. In *Chicago & S. Air Lines v. Waterman S.S. Corp., supra*, for example, the Court held that a court of appeals did not have jurisdiction to review an order of the Civil Aeronautics Board granting an air route to petitioner's competitor where the certificate had not been approved by the President. The Court noted review was impermissible even as to a step "which if erroneous will mature into a prejudicial result" since the decision "grants no privilege and denies no right." *See* 333 U.S. at 112. Because the NRC's decision did not conclude the proceeding below as to any party and because it did not authorize any kind of operation of the Perry plant, "[i]t can give nothing and can take nothing away from the applicant or a competitor." *Id.* Like the order in *Chicago & S. Air Lines*, it therefore is not final.[8]

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[8] The type of legal consequence present in cases where this Court has found final agency action stands in sharp contrast to the "harm" which OCRE has suffered. The NRC's order did not "alter and affect adversely contractual rights and business rela-

Rather than address this Court's well-established principles governing what is a final order, OCRE attempts to manufacture a conflict with the Third Circuit based upon the decision in *Westinghouse Electric Corp. v. NRC*, 598 F.2d 759 (3d Cir. 1979). (Pet. at 16-17). In *Westinghouse* the court only was concerned with whether an order "terminating" an NRC hearing on the environmental effects of a program for the commercial recycling of plutonium became final when the order was issued or when the decision explaining the order was issued. Although the court did not decide the issue because it had jurisdiction based either upon the order or the decision, the analysis of the Third Circuit in no way conflicts with the Sixth Circuit's ruling that an NRC order which did not conclude the licensing proceeding and which did not authorize operation of the Perry plant was not a "final order".

More to the point, the Third Circuit's decision in *Citizens for a Safe Environment v. AEC*, 489 F.2d 1018 (3d Cir. 1974), is directly contrary to the OCRE position. There, two intervenors in the administrative proceeding petitioned for review of a Commission order denying a motion for financial and technical assistance. In dismissing the petition, the Court of Appeals stated:

> [A] final order is one that disposes of all issues as to all parties. *See, e.g., Catlin v. United States*, 324 U.S. 229 (1945). . . . Viewed in this light a final order in a licensing proceeding under [Section 189 of

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tions." *Columbia Broadcasting System v. United States*, 316 U.S. 407, 422 (1942). Nor did the order have a "direct and immediate . . . effect on the day-to-day business" as did the labeling regulations in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967), or the approval of a dual rate system for steamship carriers in *Isbrandtsen Co. v. United States*, 211 F.2d 51, 56 (D.C. Cir.), *cert. denied*, 347 U.S. 900 (1954). OCRE cannot even contend, as did the unsuccessful petitioner in *FTC v. Standard Oil Co., supra*, 449 U.S. at 244, that it will suffer "the expense and disruption of defending itself in protracted adjudicatory proceedings" if the NRC's order is not reviewed.

> the Atomic Energy Act] would be an order granting or denying a license.

489 F.2d at 1021. "We conclude," the Third Circuit continued,

> that what is reviewable under [the Atomic Energy and Hobbs Acts] in this court in a licensing proceeding at the behest of a party thereto is a final action on the license. Collateral rulings of the Commission in the course of the proceedings must await review here until that final action is before us.

Id. at 1022-23.

A long and uniform line of Circuit Court decisions has recognized the strong policy reasons behind finality and has refused to entertain review of interlocutory NRC orders such as the order currently being contested. In *Thermal Ecology Must Be Preserved v. AEC*, 433 F.2d 524, 526 (D.C. Cir. 1970), the D.C. Circuit held that an order precluding petitioners from offering additional evidence was not a "final order." Quoting from *Thermal Ecology*, the Second Circuit in *Ecology Action v. AEC*, 492 F.2d 998, 1001 (2d Cir. 1974), held that a Commission order excluding certain issues from consideration in a licensing proceeding was not a "final order." In *Natural Resources Defense Council, Inc. v. NRC*, 680 F.2d 810 (D.C. Cir. 1982), the D.C. Circuit dismissed for lack of finality petitions to review an NRC order specifying the procedures to be used in an NRC licensing proceeding. The court explained that "the availability of relief on review of a final order in the license proceeding dictates against judicial review at this time." *Id.* at 816.

Thus, the Sixth Circuit was following well reasoned decisions applying the requirement of the Hobbs Act that decisions be "final orders" before judicial review is sought. There can be no doubt that the agency's decision not to reopen the record based on OCRE's unsupported allegation of significant safety concern was not a "final

order" within the meaning of the Hobbs Act. The order did not conclude the proceeding below as to any party, nor did it authorize any kind of operation of the Perry plant, nor was OCRE precluded from contesting this decision once the full-power operating license was granted —indeed, OCRE now has done that and lost. Immediate judicial review would therefore only interfere with the proper functioning of the NRC and create the burden of delay which the finality requirement is designed to avoid.

II. THE "COLLATERAL ORDER" DOCTRINE IS NOT AVAILABLE WHERE THE DECISION IS A PRELIMINARY RESOLUTION OF THE MERITS OF THE DISPUTE WHICH THE AGGRIEVED PARTY MAY APPEAL UPON THE ISSUANCE OF A FINAL ORDER

The NRC's decision not to reopen the record is an interlocutory order and "interlocutory orders are not appealable 'on the mere ground that they may be erroneous.'" *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 378 (1981) (quoting *Will v. United States*, 389 U.S. 90, 98 n.6 (1967)). "Permitting wholesale appeals on that ground [would be] . . . a license for broad disregard of the finality rule . . ." and the important policies it serves. *Id.* Thus, litigants have been required to wait until final judgment before contesting numerous types of procedural rulings. *See, e.g., Flanagan v. United States*, 465 U.S. 259 (1984) (pretrial disqualification of counsel); *Coopers & Lybrand v. Livesay, supra* (denying class certification); *Cobbledick v. United States*, 309 U.S. 323 (1940) (motion to quash subpoena duces tecum).

OCRE nonetheless apparently argues that it is entitled to receive interlocutory review because the NRC's decision not to reopen the record falls within the limited class of prejudgment orders which is sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available. (Pet. at 22-25).

To meet the requirements of this exception to the finality rule—known as the collateral order doctrine—the decision "must (i) conclusively determine the disputed question; (ii) resolve an important issue completely separate from the merits of the action; and (iii) be effectively unreviewable on appeal from a final judgment." *Stringfellow v. Concerned Neighbors in Action*, 55 U.S.L.W. 4299, 4301 (U.S. Mar. 9, 1987). Furthermore, "a party seeking appeal must show that all three requirements are satisfied . . . ." *Id.* While OCRE is content to state that the NRC's April 18 order conclusively determined its motion to reopen, the significant question is whether that issue is effectively unreviewable on appeal from the final NRC order authorizing full-power operation or whether that matter is an important issue completely separate from the merits of the NRC's order authorizing operation. In neither case has OCRE made the required showing.

This Court's recent decision in *Stringfellow v. Concerned Neighbors in Action* definitively establishes that OCRE's right to appeal an order granting the Utilities a full-power operating license is both the appropriate method for challenging the NRC decision not to reopen the record and provides sufficient protection of OCRE's hearing rights even if the NRC were later found to be in error. In *Stringfellow*, the respondent had sought to intervene in ongoing litigation concerning a hazardous waste disposal site and had sought review of a district court order which severely limited respondent's right to participate. This Court rejected the intervenor's claim that the district court order was reviewable under the collateral order doctrine. As a party to the suit, the respondent had "the same rights of appeal from a final judgment as all other parties." *Id.* This Court "decline[d] to extend the collateral order doctrine to provide more." *Id.* Since OCRE was a party to the licensing hearing with the right to appeal a final decision under the Hobbs Act (and did, in fact, so appeal), OCRE also can "obtain effective re-

view of its claims on appeal from the final judgment." *Id.*[9]

Nor does the NRC's order satisfy the necessary second prong of the collateral order exception—that the order resolve an important issue completely separate from the licensing of the Perry plant. In those situations in which the doctrine has been applied, the order at issue did not involve the merits of the underlying dispute but involved completely ancillary concerns. *See, e.g.*, cases cited at n.9, *supra*. Here, however, the correctness of the NRC's decision not to reopen the record turns on whether OCRE presented evidence of significant safety concerns which would render a full-power operating license unsafe. The NRC denied the Motion to Reopen because it found that OCRE had failed to raise a significant safety concern. 23 N.R.C. at 235. This issue is the very heart of NRC licensing actions. To issue a license, the NRC must determine that the applicant is "equipped to observe . . . such safety standards to protect health and to minimize danger to life or property as the Commission may by rule establish . . . ." 42 U.S.C. § 2133(b) (1982); *see also* 10 C.F.R. Part 2, App. A, § VIII(b). Thus, resolution of the Motion to Reopen is not collateral because it involves "considerations that are 'enmeshed in the factual and legal issues comprising the . . . cause of action.'" *Coopers & Lybrand v. Livesay*, *supra*, 437 U.S. at 469; *see also FTC v. Standard Oil Co.*, *supra* (issuance of a complaint by the FTC is a step in the process of determining whether petitioner violated the Federal Trade Commission Act and is therefore not appealable).

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[9] Cases where this Court has applied the collateral order doctrine, and has held that appellate review will be ineffective, involve forcing the litigant: (a) to face a risk which the appellate court cannot correct even if it issues an order to that effect, *see, e.g., Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); or (b) to endure a process which will be completed by the time for appeal, *see, e.g., Abney v. United States*, 431 U.S. 651 (1977). Neither circumstance applies here.

Finally, OCRE's complaints do not raise "an important issue." In *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), this Court emphasized this requirement, stating that "[a]s an additional requirement, *Cohen* established that a collateral appeal of an interlocutory order must 'presen[t] a serious and unsettled question.'" *Id.* at 742. Such a question is not present in this case where the only issue is whether the NRC properly exercised its discretion in determining that OCRE did not present sufficient evidence to justify reopening the record. This decision was a finding of fact, reversible only for abuse of discretion. *Oystershell Alliance v. NRC*, 800 F.2d 1201, 1207 (D.C. Cir. 1986). And in this case, the Sixth Circuit has determined in its decision on the merits that the NRC did not abuse its discretion. *State of Ohio v. NRC*, Nos. 86-4019, -4037, -4038 (6th Cir. Mar. 17, 1986). (Util. App. at 1a-14a).

III. THIS CASE IS RENDERED MOOT BY THE COURT OF APPEALS' REVIEW OF THE NRC'S FINAL ORDER AUTHORIZING THE FULL-POWER OPERATION OF THE PERRY PLANT

OCRE objects to the Sixth Circuit's decision that the court lacked jurisdiction to review an NRC interlocutory order not to reopen the record. That complaint was rendered moot on March 17, 1987, when the Court of Appeals decided that the NRC properly denied OCRE's motion. After that point, no controversy exists between the parties as to whether the NRC decision not to reopen the record was or was not a final order. OCRE has received the judicial review it is seeking in this case, and a decision by this Court that judicial review should have been completed earlier cannot now affect the rights of the parties.

Article III of the Constitution requires that a federal court adjudicate only a currently existing "case or controversy." *Burke v. Barnes*, 107 S. Ct. 734, 736 (1987).

Federal courts are therefore prohibited from rendering advisory opinions which cannot affect the rights of litigants before them. *Id.*; *see also Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). Even if a case or controversy is "live" at the time of the initial litigation, a court may not render an opinion if subsequent events have mooted the question presented. *See, e.g., Burke v. Barnes*, *supra*; *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Where full relief has been provided, a proceeding seeking similar relief cannot affect the rights of the parties before it and, therefore, is moot. *Washington Market Co. v. District of Columbia*, 137 U.S. 62 (1890) (per curiam); *Natural Resources Defense Council, Inc. v. NRC*, *supra*, 680 F.2d at 814-15.

Although OCRE's petition for a writ of certiorari does not specify the relief it desires, the only conceivable relief is a decision that the Court of Appeals had jurisdiction to review the NRC's denial of OCRE's motion to reopen prior to issuance of the full-power operating license and, furthermore, an order from this Court remanding the case to the Court of Appeals for a decision on the merits. When the Sixth Circuit on March 17, 1987, in *State of Ohio v. NRC*, Nos. 86-4019, -4037, -4038 (6th Cir. Mar. 17, 1987) (Util. App. at 1a-14a), decided that the NRC "reasonably exercised its discretion" in denying OCRE's motion to reopen, the case was rendered moot.

CONCLUSION

For all the foregoing reasons, OCRE's petition for a writ of certiorari should be denied.

Respectfully submitted,

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March 26, 1987

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 86-4019, 86-4038, & 86-4037

STATE OF OHIO (86-4019 & 86-4038) and
OHIO CITIZENS FOR RESPONSIBLE ENERGY, INC.
(86-4037),
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION, and
UNITED STATES OF AMERICA,
Respondents,

CLEVELAND ELECTRIC ILLUMINATING COMPANY,
DUQUESNE LIGHT COMPANY, OHIO EDISON COMPANY,
PENNSYLVANIA POWER COMPANY, and
TOLEDO EDISON COMPANY,
Intervenors.

Petition To Review Orders of the
Nuclear Regulatory Commission

Decided and Filed March 17, 1987

Before: ENGEL, JONES, and RYAN, Circuit Judges.

RYAN, Circuit Judge, delivered the opinion of the court, in which ENGEL, Circuit Judge, joined. JONES, Circuit Judge, (pp. 13a-14a) delivered a separate concurring opinion.

RYAN, Circuit Judge. Petitioners seek to overturn three orders of the Nuclear Regulatory Commission (the NRC):

1. Petitioner State of Ohio appeals an order of the NRC denying leave to intervene in licensing proceedings pertaining to the Perry Nuclear Power Plant (the plant);

2. Petitioner Ohio Citizens for Responsible Energy, Inc. (OCRE) appeals an order of the NRC denying its motion to reopen the record in the plant licensing proceedings; and

3. Both petitioners appeal the NRC's order authorizing the plant's full-power operating license.

The issue is whether the NRC reasonably exercised its discretion in making these determinations. We hold that it did, and affirm all three orders.

I

In 1980, intervenor Cleveland Electric Illuminating Company (CEI) and other public utilities applied to the NRC for a license to operate the Perry Nuclear Power Plant on the shore of Lake Erie in Northern Ohio. The NRC granted party status to OCRE and other interested parties in 1981. The State of Ohio did not seek to participate at that time.

Hearings were held pursuant to the Atomic Energy Act, 42 U.S.C. § 2239(a) (1973), in 1983 and 1985. No party to the proceedings raised the issue of the plant's capacity to withstand earthquakes. The adequacy of emergency planning was challenged by Sunflower Alliance, an intervenor in the proceedings, and was ultimately approved by the NRC. The record was closed on May 3, 1985.

On January 31, 1986, an earthquake of magnitude 5.0 on the Richter scale occurred approximately ten miles away from the plant. On February 3, 1986, OCRE filed a motion to reopen the record to consider the capacity of the plant's structures to resist seismic activity of this magnitude. In support of its motion, OCRE submitted a newspaper article reporting that vibratory ground motion at the plant during the earthquake had exceeded the peak acceleration for which the plant had been designed.

The NRC staff studied the available data and determined that, while the earthquake was severe and was different in some respects from the archetype of earthquake motion used in designing the plant structures, the high frequency energy levels that had exceeded the "design spectrum" for ground motion did not raise a serious safety concern. The plant had been designed to withstand earthquakes with magnitudes of 5.3 ± 0.5 because the most severe earthquake in the pertinent geographical zone, the 1937 Anna, Ohio, earthquake, had an estimated magnitude of 5.0-5.3.

The appeal panel to which OCRE's contentions were submitted, recognizing the highly technical nature of the issues, scheduled an exploratory hearing in order to fully consider OCRE's claims. The NRC, however, determined that such a hearing was not appropriate and, because OCRE had failed to support its motion with evidence sufficient to merit reopening the record, ordered that the motion be denied. OCRE has appealed this denial.

The January, 1986, earthquake also stimulated new concerns on the part of the Governor of Ohio. These concerns were heightened by the April, 1986, nuclear accident at Chernobyl, in the Soviet Union, and eventually focused upon the adequacy of the emergency preparedness plans for Ohio's commercial nuclear reactors. On August 15, 1986, the Governor appointed a cabinet-level task force to review the adequacy of the evacuation

plan which had previously been prepared by Ohio authorities with a view to the eventual full-power operation of the plant. On the same day, the Governor informed the NRC that he was withdrawing his support for the plan. He requested that the NRC delay its vote on full-power licensing until after the task force report was complete. The task force was given a due date of December 31, 1986. We have not been advised at this writing whether the report has been completed or, if completed, released.

While maintaining informal communications with the NRC about its concerns and the progress of the task force's investigation, Ohio also sought formal intervention in the proceedings on September 5, 1986, as an "interested state" under 10 C.F.R. § 2.715 (1986). On October 29, Ohio submitted preliminary findings of the task force to the NRC, requesting that full-power licensing be delayed until the report was completed and the emergency plan could be revised accordingly. On October 30, the NRC denied Ohio's motion to intervene. Ohio has appealed this denial.

Meanwhile, the NRC's final vote on the plant's full-power license, originally scheduled for September 4, was stayed by this court at the instance of OCRE, which contended that it had a right to appeal the denial of its motion to reopen the record prior to that vote. On October 14, this court rejected OCRE's petition for review on the ground that the denial was not a final agency order. *Ohio Citizens for Responsible Energy, Inc. v. NRC*, No. 86-3355, slip op. (6th Cir. Oct. 14, 1986). Accordingly, the stay was lifted.

On November 7, as the NRC prepared to conduct the vote on full-power licensing, Ohio petitioned this court to review the NRC's denial of Ohio's motion to intervene and also sought an emergency stay of the vote pending review. The vote proceeded, and the license was granted. Ohio and OCRE both sought review in this court of the

NRC's final order granting the full-power operating license.

Although the license was issued on November 13, 1986, this court immediately ordered that implementation of full-power operation be stayed pending our review of these appeals. The plant thus continued operating at 5% capacity, as it had before the license was issued, rather than beginning the gradual escalation to 100% capacity authorized by the license.

On November 14, we consolidated and expedited the appeals of Ohio and OCRE. Oral argument was heard on December 3. On December 12, 1986, the five intervenor utilities moved the court to lift the stay, claiming that the "costs of delaying plant operations are accumulating at approximately $2.2 million per day or more than $40 million to date." The motion was opposed by the State of Ohio. We lifted the stay on December 23, 1986, Judge Jones dissenting. An application to the United States Supreme Court by OCRE to stay the mandate of our order lifting the stay was denied on December 31, 1986, in an opinion of Justice Scalia.

II

OCRE contends that the NRC's refusal to reopen the record in response to its request following the January, 1986, earthquake illustrates two chronic bureaucratic evils: first, the agency's inclination to shut the public out of the decision-making process, confident in the sufficiency of its own knowledge and expertise; and second, the agency's impatience with the pace of the democratic decision-making process imposed upon it by statute, which inclines the NRC to dispense with any procedure, however well-founded, that threatens delay.

In this case, these contentions are without merit. The agency proceedings in this case do not suggest an intolerance for public participation on the part of the NRC.

The statutory scheme requires hearings to be held only upon those issues interested parties raise before the NRC in a timely manner. In the absence of a request, no hearings need be held at all. 42 U.S.C. § 2239(a)(1). Safety concerns not raised in public hearings must nonetheless be addressed by the NRC staff.

In this case, seismic considerations were not raised by OCRE or any other participant in the public licensing hearings. Accordingly, the NRC staff addressed this issue on its own in accordance with the NRC's Seismic and Geologic Siting Criteria for Nuclear Power Plants, 10 C.F.R. Part 1, App. A. Thus, the NRC's reluctance to reopen the record on this issue does not imply either a high-handed disdain for public comment or a lack of concern for the seriousness of the issue. Rather, it indicates only that the public comment period was closed, and that the NRC had not been convinced that OCRE had a significant contribution to make to further staff analysis.

True, new data, in the form of an unexpected earthquake, had appeared since the closing of the record. However, in the absence of some showing that OCRE could assist materially in the analysis of that new data, there is no reason why that event, of itself, would require the record to be reopened. One of the purposes of the NRC's discretionary option to refuse reopening the record is to assure that the party who would reopen the record offers such material assistance rather than a mere continuation or rehash of the process ostensibly terminated when the record was closed initially.

"Under Commission practice, reopening is required when *new evidence* is shown to be *timely*, *safety significant*, and sufficiently *material* to have changed the result initially taken." *San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1318 (D.C. Cir. 1984) (emphasis in original), *aff'd*, 789 F.2d 26 (D.C. Cir. 1986) (en banc). Here, OCRE's motion was conceded to be timely,

but the NRC held that OCRE had not shown safety significance.

At the time of its motion, OCRE submitted only a newspaper article in support of its claims. Even if the NRC had permitted the appeal panel to proceed with its exploratory hearing, OCRE planned to offer no information or analysis of its own, but intended instead to conduct a cross-examination of witnesses presented by CEI and the NRC staff. Furthermore, OCRE had conceded that the January earthquake did little or no damage to the plant and "that the high frequency exceedances of the SSE [Safe Shutdown Earthquake] design acceleration recorded in the January 31, 1986 earthquake do not have engineering significance." Instead, OCRE sought to introduce a new theory, based on the improbable contention that a discoverable "capable fault" (as defined in 10 C.F.R. Part 1, App. A, III(g)) caused the earthquake, even though such faults have rarely been identified east of the Rocky Mountains, and that the NRC staff had accordingly applied the wrong standards in making its seismic calculations.

In the face of this claim, palpably lacking in proof, the NRC staff opposed an extensive study purporting to answer OCRE's contentions in an exhaustive and technical manner.

Although we recognize the possibility that the pace of events and the implications of new information and developments may at times outstrip the relatively fixed agenda of an entrenched bureaucracy, and while we would not equate the absence of hard data in a case such as this with the absence of a threat to public safety, the fact remains that OCRE has made no showing that it has anything to contribute to the analysis of the plant's seismic security and only the barest of allegations that the January, 1986, earthquake has undermined the technical premises of the plant's structural design. Despite

the appeal panel's willingness to give OCRE an opportunity to flesh out these allegations, we do not consider the NRC's decision to dispense with that opportunity necessarily to indicate unseemly haste.

Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87 (1983), involved a challenge to the NRC's approach to evaluating the environmental impact of the storage of certain nuclear wastes. In this context, the Court observed that

> "a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."

Id. at 103. Arguably, somewhat less deference is appropriate here, but the fact remains that our role in reviewing NRC denials of requests to reopen the record is quite limited:

> "Where as here the agency has taken final action on a matter that is perculiarily within its realm of expertise, we will not require the agency to reopen its proceedings except upon a clear showing of abuse of discretion or of extraordinary circumstances."

Mobil Oil Corp. v. ICC, 685 F.2d 624, 632 (D.C. Cir. 1982).

A failure of the NRC to follow its own guidelines would constitute an abuse of discretion, *see San Luis Obispo Mothers for Peace v. NRC*, 751 F.2d 1287, 1318 (D.C. Cir. 1984), *aff'd*, 789 F.2d 26 (D.C. Cir. 1986) (en banc), but the NRC's action here was expressly premised upon a well-founded conclusion that OCRE had failed to show that new data resulting from the January, 1986, earthquake were safety significant. Evidently, OCRE was surprised by the NRC's procedure of inter-

jecting itself into the reopening petition process and cancelling the exploratory hearing scheduled by the appeals panel. However, so long as the decision to reopen is committed to the NRC's discretion, no intervenor can claim an entitlement to an exploratory hearing the NRC reasonably deems to be unnecessary.

III

NRC regulations delegate responsibility for developing off-site emergency plans to state and local governments. 10 C.F.R. § 50.47. These regulations provide in part:

> "(a)(1) Except as provided in paragraph (d) of this section, no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.
>
> "(2) The NRC will base its finding on a review of the Federal Eemrgency Management Agency [FEMA] findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and whether there is reasonable assurance that they can be implemented."

The emergency plan for the Perry plant was developed by the State of Ohio, which now contends that the plan is seriously inadequate.

Ohio seeks to intervene in the plant's licensing proceedings, citing 10 C.F.R. § 2.715(c), which provides in part:

> "The presiding officer will afford representatives of an interested State, county, municipality, and/or agencies thereof, a reasonable opportunity to participate and to introduce evidence, interrogate wit-

> nesses, and advise the Commission without requiring the representative to take a position with respect to the issue."

This regulation preserves the right of a state to participate in licensing hearings, but does not address the state's rights once the hearings have been completed and the record closed. Thus, the state's belated request to intervene must be considered by this court in light of the limited "abuse of discretion" standard of review otherwise applicable to requests to reopen the record, as set forth above.

Ohio contends, however, that the NRC has abused its discretion in denying it leave to intervene. Ohio claims it is not an opponent of nuclear power, and has no intention of holding up plant operations indefinitely. On the contrary, Ohio asked only for a delay in full-power operation until the end of 1986 so that the emergency plan could be fully studied and revisions could be undertaken. Ohio's request was not unreasonable. This court takes judicial notice of the fact that the stays we have imposed have come very close to rendering this issue moot despite our best efforts to resolve this matter expeditiously.

We recognize also that Ohio's responsibility for the safety of its inhabitants is unquestionably deserving of this court's consideration. In view of this responsibility, the untimeliness of Ohio's action and its failure to participate in the earlier public hearings would be entirely insufficient as grounds for NRC action dispensing with Ohio's concerns. The NRC, however, has neither ignored Ohio's contentions nor acted unreasonably in denying leave to intervene.

First, we note that Ohio's responsibility is entirely with *off-site* emergency preparations. These preparations may proceed apace regardless of the operational status of the plant.

Second, while the regulatory scheme was clearly designed to prevent full-power licensing until the NRC finds that there is "reasonable assurance" that the emergency plan is adequate, the NRC has in fact made a finding to this effect. Many of Ohio's more specific concerns were raised in the public hearings by intervenor Sunflower Alliance. Ohio's newfound misgivings are troubling, but do not necessarily undercut the reliability of the NRC's finding.

Finally, issuance of a license does not preclude Ohio from proceeding with research, oversight, and revisions in any portions of the emergency plan perceived as inadequate. Furthermore, 10 C.F.R. § 2.206 gives any person the right to institute a proceeding to "modify, suspend or revoke a license." While we recognize that it may be more difficult to shut a plant down than to prevent initial licensing, the procedure provided for by § 2.206 appears to provide an adequate remedy for any grave safety shortcomings Ohio may henceforth discover and document.

These considerations persuade us that the NRC acted reasonably in denying Ohio's request to intervene in the full-power licensing proceedings.

IV

Aside from the allegations contained in OCRE's petition to reopen the record and Ohio's petition for leave to intervene, we are presented with no basis upon which the NRC's decision granting the full-power operating license should be reversed. Accordingly, petitioners' objections to this decision must also be rejected.

V

Our treatment of the issues raised on this appeal is conditioned by the very limited role Congress has assigned to the courts in the statutory scheme regulating

the construction and operation of commercial nuclear power plants. As the Supreme Court has observed:

> "We are acutely aware that the extent to which this Nation should rely on nuclear power as a source of energy is an important and sensitive issue. Much of the debate focuses on whether development of nuclear generation facilities should proceed in the face of uncertainties about their long-term effects on the environment. Resolution of these fundamental policy questions lies, however, with Congress and the agencies to which Congress has delegated authority, as well as with state legislatures and, ultimately, the populace as a whole. Congress has assigned the courts only the limited, albeit important, task of reviewing agency action to determine whether the agency conformed with controlling statutes. As we emphasized in our earlier encounter with these very proceedings, '[a]dministrative decisions should be set aside in this context, as in every other, only for substantial procedural or substantive reasons as mandated by statute . . ., not simply because the court is unhappy with the result reached.' Vermont Yankee, 435 US, at 558, 55 L Ed 2d 460, 98 S Ct 1197 [1978]."

Baltimore Gas and Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97 (1983). The NRC acted within the confines of its statutory discretion in making the three decisions challenged by these appeals. This court is therefore required to uphold those decisions.

VI

The orders of the NRC appealed from are AFFIRMED.

JONES, Circuit Judge, concurring. The opinion of the court in this case sets out as good a basis for affirming the Nuclear Regulatory Commission's orders as can be done. Because I am persuaded that the scope of judicial review delineated by the Supreme Court in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87 (1983), and *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), is extremely narrow, I concur in today's result. Nonetheless, I am sufficiently alarmed by the events that gave rise to the instant proceedings to write separately.

The court's opinion summarizes OCRE's description of the NRC's "bureaucratic evils" as:

> first, the agency's inclination to shut the public out of the decision-making process, confident in the sufficiency of its own knowledge and expertise; and second, the agency's impatience with the pace of the democratic decision-making process imposed upon it by statute, which inclines the NRC to dispense with any procedure, however well-founded, that threatens delay.

The majority of this panel finds no merit in such a description. However, if the proceedings in this case are any indication of the Commission's standard practice, I think that the description is quite accurate. From my perspective, there is no better way to characterize the Commission's *sua sponte* order vacating the Appeal Panel's order scheduling an exploratory mini-hearing. The purpose of that mini-hearing was to determine whether the unexpected and uncharacteristically strong earthquake raised significant safety issues warranting a reopening of the record.

The Commission's treatment of the State of Ohio's concerns with the adequacy of the off-site emergency preparedness plan is even more disconcerting. The NRC's

argument in support of its denial of the State's motion to intervene boils down to the following: While it is not too late for the State to make improvements in the existing off-site emergency plan that it fears may be seriously inadequate in certain respects, it is in fact too late for the State to guarantee the safety of its citizenry by temporarily delaying the issuance of Perry's full-power license pending the completion of its formal review. Granted, the Commission is not legally *required* to further stay the plant's full-power operation since it has satisfied itself that the existing off-site plan is adequate. However, that it not really the point. Where, as here, the State has expressed bona fide concerns for the safety of its people and has in good faith undertaken affirmative investigatory measures, it is at best patronizing for the Commission to turn a deaf ear to the State's plea for a brief delay. While the Nuclear Regulatory Commission may be secure in its belief that it is the ultimate protector of the American people generally, and of the people of Ohio specifically, from the hazards of nuclear power generation, I do not think that Congress ever intended for the Commission to have this type of one-sided relationship with a sovereign State over a serious matter of local health and safety.